

**BEFORE THE
ALCOHOL AND TOBACCO COMMISSION**

WALGREEN CO.)	Type 208 Application
d/b/a WALGREENS No. 12109)	Excise District No. 1
7236 CALUMET AVE.)	
HAMMOND, INDIANA)	
)	
PERMIT NO. DL 45-26761)	Lake County Local Board
)	
Applicant-Petitioner)	

**PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

I.

BACKGROUND OF CASE

Petitioner, Walgreen Co., d/b/a Walgreens No. 12109, located at 7236 Calumet Avenue, Hammond, Indiana (“Applicant” or “Walgreens”), applied for a type 208¹ Alcohol and Tobacco Commission (the “Commission”) permit, #DL45-26761 (“Permit”). Walgreens’ application for the Permit was assigned to the Alcoholic Beverage Board of Lake County (“Local Board”). The Local Board held a hearing on May 6, 2010 (“LB Hearing”) and voted 3-1 to deny the Permit, with the Excise Officer voting in favor of the Permit. On May 6, 2010, the Commission voted to deny the application for the Permit.

On June 1, 2010, Walgreens timely filed Petitioner’s Objection to and Request for Administrative Review and Hearing of the Commission’s Denial of Applications and Request for Appeal. Four (4) remonstrators petitioned to intervene in the appeal. Each of those petitions for intervention was denied.

The matter was set for hearing on August 24, 2010 (“ATC Hearing”), before Hearing Judge E. Edward Dunsmore (“Hearing Judge”). At that time, witnesses were sworn, evidence was heard, and the matter was taken under advisement. (ATC Hearing) The Hearing Judge also took judicial notice of the entire contents of the file related to the Permit in this case (“ATC

¹ Liquor, beer, and wine (drug store) dealer permit in an incorporated area.

File"). Having been duly advised of the facts and law at issue, the Hearing Judge now submits these Findings of Fact and Conclusions of Law to the Commission for its consideration.

II.

EVIDENCE BEFORE THE LOCAL BOARD

- A. The following individuals testified before the Local Board in favor of the Applicant in this cause:
 - 1. Alex C. Intermill, attorney for Applicant;
 - 2. Edward Kielbasa, Walgreens Store Manager for Store No. 12109, located at 7236 Calumet Avenue, Hammond, Indiana.
- B. The following evidence was introduced and admitted before the Local Board in favor of the Applicant in this cause:
 - 1. Manager's Statement of Edward Kielbasa, for Store No. 12109, which contained the following exhibits:
 - a. Exhibit 1 – Affidavit of Compliance Regarding Notice Posting, March 21, 2010
 - 2. Petitions of Support of the Applicant for Permit No. DL 45-26761, at Store No. 12109, containing 542 customer signatures with 242 in favor of the application.
- C. The following individuals testified before the Local Board against the Applicant in this cause:
 - 1. Kris Kantar, Hammond City Attorney.
 - 2. Mark Kalwinski, Councilman 1st District Hammond, IN.
 - 3. Bonnie Henry, concerned citizen.
 - 4. Janet Venecz, Community Watch.
- D. The following evidence was introduced and admitted before the Local Board against the Applicant in this cause.
 - 1. Permit No. DL 45-26761 – Letter from Jerry Kirk, a local package liquor store owner, who had an application for transfer of location to a location just south of the present location denied by the Local Board in 2009 (permit No. DL45-11752); and,
 - 2. Permit No. DL 45-26761 – 213 signatures opposed to issuance of the permit. There was no place to indicate being in favor of the permit.

III.

EVIDENCE PRESENTED BEFORE THE COMMISSION

- A. Walgreens, the sole party to this appeal, attended the ATC Hearing with its counsel, Lisa McKinney Goldner, Esq. and Alex C. Intermill, Esq., and two witnesses whose testimony is addressed below.
- B. Remonstrator Janet Venecz attended the ATC Hearing and offered testimony against Permit No. DL 45-26761, Walgreens Store No. 10129.
- C. Official notice was taken of the ATC File for this matter.
- D. The following testimony was offered at the ATC Hearing in favor of Walgreens:

- 1. Edward Kielbasa, Store Manager for Walgreens No. 12109, testified the information contained in his Manager's Statement, which was submitted at the LB Hearing, and his testimony before the Local Board regarding Walgreens' training and security measures, his experience at Walgreens, etc., remain correct and accurate.

Prior to the ATC Hearing, Walgreens conducted two separate polls, one before the LB Hearing and one before the ATC Hearing. The first poll sampled 542 customers who were at least twenty-one years old. Two hundred forty-two (45%) of those polled were in favor of the Permit. In the more recent poll taken after the LB Hearing, of the 138 customers sampled, 72 (52%) of Walgreens customers over the age of twenty-one were in favor of the Permit. Approximately, 70% of the customers from the second poll listed Crown Point as their address. Mr. Kielbasa believes the signatures on the petitions demonstrate the community's desire for the Permit.

Walgreens gives back to the community in sponsorships, donations, and investment in the store to beautify the corner and neighborhood.

- 2. Anas al-Hamwi, District Manager for Walgreens No. 12109, testified that the training and security measures to be utilized by Walgreens Store No. 5628 have been implemented without issue at other Walgreens that have already received alcohol permits in Lake County, and in Hammond, Indiana. There have been no issues with theft, security system malfunctions, or violations of alcoholic beverage laws at any of the Walgreens stores in Lake County that have permits.

Store No. 10129 has one of the lowest theft and shoplifting rates in the district, which is evidence that the security measures work.

Walgreens is highly involved in the community through sponsorships and donations. It also invested a significant amount of money to remodel the store and beautify the corner on which the store sits.

Walgreens' policy is to card everyone who attempts to purchase alcohol. Both managers and employees are held accountable for following alcoholic beverage laws.

Mr. al-Hamwi testified that Walgreens is answering the call of its customers in seeking the Permits, especially with respect to senior citizens who want the one-stop-shop convenience.

E. The following exhibits were admitted as part of the ATC Hearing record as evidence offered by Walgreens in favor of issuing the Permit:

1. Additional petitions collected by Walgreens prior to the ATC Hearing with approximately 138 Walgreens customer signatures with 52% in favor of the Permit. (Exhibit A – for Permit No. DL 45-26761)
2. Trend of Annual Alcohol Use among Indiana Students: 1991-2004. (Exhibit B)
3. Sunset Audit dated May 1987-Office of Fiscal Review- Indiana Legislative Services Agency. (Exhibit C)

F. The following testimony was offered at the ATC Hearing in opposition of Walgreens:

1. Janet Venecz of the Community Watch organization asked that the Commission prevent the harms that may be caused by issuing Permit No. DL 45-26761. Ms. Venecz believes her neighborhood wants to prevent another "liquor opportunity."

Ms. Venecz testified that approximately one year ago another liquor business attempted to locate to the immediate south of this Walgreens' store and the community remonstrated and stopped the issuance of the permit.

2. Ms. Venecz pointed out that only thirty (30) of the signatures on Walgreens' second set of petitions, Exhibit A, list a specific address for Hammond.

Ms. Venecz testified that this Walgreens is in a residential area and that other Walgreens stores did not meet opposition because they are not in a residential district.

Ms. Venecz requested Walgreens to sponsor an ad for an event called "National Night Out" against drugs and crime, hosted by her organization and another, but she received no answer from Walgreens. She does not believe Walgreens participates in community events, nor does it contribute to any activity in Hammond, Indiana.

Ms. Venecz read into the record a letter referenced below. (Rem. Exhibit 1)

- H. The following exhibits were admitted as part of the ATC Hearing record as evidence offered by the remonstrators against the of issuing the Permit:
1. Letter from Community Watch referencing the signatures submitted at the LB Hearing, alleging that Walgreens is in a residential area, that Hammond is over quota, regardless of the types of permits, and suggests the neighborhood will be safer without the permit. (Exhibit 1 – for Permit No. DL 45-26761)

IV. FINDINGS OF FACT

1. Walgreen Co. d/b/a Walgreens No. 12109 is the applicant for the Type 208 ATC Permit No. DL 45-26761. (ATC File)
2. The Applicant meets the qualifications to hold a permit pursuant to IC 7.1-3-4-2, IC 7.1-3-5-2, IC 7.1-3-10-2, IC 7.1-3-15-2, and 905 IAC 1-27-1. (LB Hearing; ATC Hearing)
3. Janet Venecz signed as a remonstrator against the Permit at the LB Hearing and appeared and testified at the ATC Hearing. (LB Hearing; ATC Hearing; ATC File)
4. Petitioner contends the decision of the Local Board to deny the permit was not supported by substantial evidence. (Petitioner's Proposed Findings of Fact and Conclusions of Law; Appeal Hearing; ATC File)
5. Petitions were submitted as evidence that the community needs and desires the Permit. The results of those petitions were: Walgreens submitted petitions at the LB Hearing totaling 542 signatures of which 300 were opposed to the issuance of the Permit and 242 were in favor. Remonstrators submitted petitions at the LB Hearing with 213 signatures in opposition to the Permit. At the ATC Hearing, the Applicant submitted additional petitions containing signatures of customers that were collected after the LB Hearing. The results of those petitions were: 138 signatures with 72 in favor of and 66 opposed. Of all petitions submitted by both Walgreens and Remonstrators at both the LB Hearing and the ATC Hearing, 579 people opposed the issuance of the Permit and 314 were in favor of its issuance. (LB Hearing; ATC Hearing; ATC File)
6. Walgreens has extensive security measures to deter and prevent theft of alcohol and the sale of alcohol to minors. In addition, Walgreens' employees are thoroughly trained to avoid problems with theft and the sale of alcoholic beverages to minors and intoxicated people. (LB Hearing; ATC Hearing)

7. The Permits are not being placed within two hundred (200) feet of a church and/or school. (LB Hearing)
8. The evidence is conflicting as to whether the Permit is being placed in commercial location or in a residential area, but the weight of the evidence makes it clear that the area is at least near a neighborhood residential area. (LB Hearing; ATC Hearing)
9. Evidence was presented at the Local Board Hearing and at the ATC Hearing that:
 - a) There is no need and desire for the permit premises at this location;
 - b) There is a negative impact on the other businesses and services at this location. (LB Hearing, ATC Hearing)
10. Certain individuals appeared at the LB Hearing and one at the ATC Hearing to remonstrate and/or testify against the granting of Permit No. DL45-26761 at this location (LB Hearing; ATC Hearing)
11. The remonstrators at the LB Hearing and the witness at the ATC Hearing generally believed that the neighborhood and community did not need or desire these services at this location and that the proposed location would have a negative impact on the neighborhood in general. (LB Hearing; ATC Hearing)
12. The Local board voted 3-1 to deny this permit. (LB Hearing; ATC File)
13. The Local Board indicated that its recommendation to deny was based on the lack of need and desire in the community for the services. (Local Board Hearing; ATC File)
14. Any Finding of Fact may be considered a Conclusion of Law, if the context so warrants.

V.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter, pursuant to IC 7.1-1-2-2 and IC 7.1-2-3-9.
2. The permit applications were properly submitted pursuant to IC 7.1-3-1-4.
3. The Commission is authorized to act upon proper applications for permits. *Id.*
4. The Hearing Judge may take judicial notice of the Commission file relevant to a case, including the transcript of the proceedings and exhibits before the local board. 905 IAC 1-36-7(a).

5. The Hearing Judge conducted a *de novo* review of the appeals on behalf of the Commission, including a public hearing and a review of the records and documents for each of the above-captioned matters in the Commission's file. IC 7.1-3-19-11(a); 905 IAC 1-6-7(a); *see also* IC 4-21.5-3-27(d).
6. Evidence at the ATC Hearing was received in accordance with the Indiana Administrative Code and the Commission's rules. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on the matters officially noticed in the proceedings. 905 IAC 1-36-8; Ind. Code 4-21.5-3-27(d).
7. The Applicant is a fit and proper applicant, has maintained a reputation for decency and law obedience, and is well qualified to hold an alcoholic beverage permit under Indiana law. 905 IAC 1-27-1; IC 7.1-3-9-10.
8. Walgreens is not disqualified from holding an ATC permit. IC 7.1-3-4-2; IC 7.1-3-15-2.
9. The ATC may consider both a need and desire for the permit in determining whether a permit should be issued in a particular matter. 905 IAC 1-27-4.
10. In determining whether to issue a permit, the Commission shall investigate the desirability of the permit in regard to the potential geographical location of said permit. In making this determination, the Commission may consider, *but is not limited to the following factors*: (a) The need for such services at the location of the permit; (b) the desire of the neighborhood or the community to receive such services; (c) impact of such services on other business in the neighborhood or community; and (d) impact of such services on the neighborhood or community. 905 IAC 1-27-4.
11. A determination of whether there exists a need and desire for the services at the location in question turns on the facts of each case. *Id.*
12. The Petitioner presented evidence of need and desire by customers for the services at the location in question. Evidence was presented at the LB Hearing by Remonstrators and at the ATC Hearing by witnesses that there is not a need and desire for such services at the location. Hence the facts as to the application of 905 IAC 1-27-4 are clearly in dispute and must be weighed and decided according to the standards enunciated in Title 7.1 and case law interpreting it. Ind. Code 7.1 -2-3-7; Ind. Code 7.1-3-19-1 *et.seq.*

13. The Commission has discretion to issue or deny an application for a dealer's permit. Ind. Code 7.1-3-19-1; *Indiana Alcoholic Beverage Comm'n v. State ex rel. Harmon*, 269 Ind. 48, 379 N.E.2d 140 (1978)
14. The Commission may investigate an application for such a permit in whatever manner it deems best and may grant or refuse the application "as it deems the public interest shall be served best." Ind. Code 7.1-3-19-10; *Harmon*, 269 Ind.48, 379 N.E.2d 140
15. The Commission must deny an application for a permit when a majority of the members of a local board recommend that the permit not be granted unless the commission determines, after *de novo* review, that to follow the recommendation would be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) contrary to a constitutional right, power, privilege, or immunity; (3) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. Ind. Code 7.1-3-19-11(a); *Taylor Drug Stores, Inc. v. Indiana Alcoholic Beverage Comm'n*, 497 N.E.2d 932 (Ind. Ct. App. 1986)
16. The Commission may decline to follow the recommendation of a local board where the recommendation is unsupported by substantial evidence. *Id.*
17. The substantial evidence standard is met if a reasonable person could conclude that the evidence and the logical inferences from such evidence are of such a substantial character and probative value as to support the administrative determination. *Indiana Alcoholic Beverage Comm'n v. Edwards*, 659 N.E.2d 631 (Ind. Ct. App. 1995)
18. The decision of the Local Board to deny the permit was based upon substantial evidence and in all other respects conformed to the requirements of Ind. Code 7.1-3-19-11(a). The Local Board heard testimony and reviewed petitions submitted by the Remonstrators regarding the community's need or desire for the grant of a permit to the Applicant, as well as the impact of the permit on the neighborhood, community and other businesses. Comments made by members of the Local Board and the Local Board Voting Sheet indicated the majority of the board felt there was not a need and/or desire for alcohol to be served at the proposed permit premises. Under 905 IAC 1-27-4, the Local Board must consider community need and desire in reaching their decision, as well as the impact of the permit on the neighborhood, community and businesses. The Local Board considered the evidence before it and based its decision on that evidence. (LB Hearing).
19. Any Conclusion of Law may be considered a Finding of Fact if the context so warrants.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the findings of the Lake County Local Alcoholic Beverage Board resulting in a 3-1 vote concerning the denial of the

Application for Permit No DL 45-26761, was supported by substantial evidence and the Alcohol and Tobacco Commission should **deny** said Application. The Application filed by Walgreen Co. d/b/a Walgreens No. 12109 located at 7236 Calumet Avenue, Hammond, Indiana, for the Type 208 Alcohol and Tobacco Commission Permit, #DL45-26761, should be **DENIED**.

DATED: November _____, 2010

E. Edward Dunsmore, Hearing Judge

Approved this _____ day of _____ 2010.

P. THOMAS SNOW, CHAIRMAN

DAVID JOHNSON, VICE CHAIR

DALE STURTZ, COMMISSIONER

FRANK GUTHRIE, COMMISSIONER